

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. **76-896**

SYLVESTER JONES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT**

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THE EIGHTH CIRCUIT**

The Petitioner, Sylvester Jones, by and through his Court appointed attorney of record, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, the said judgment being entered on or about November 9, 1976.

OPINION BELOW

The Court of Appeals entered its opinion on or about November 9, 1976. A copy of the said opinion is attached hereto and made a part hereof and incorporated herein by reference, being marked as Appendix A.

JURISDICTION

The Court of Appeals rendered its judgment and entered the same on or about November 9, 1976. (App. A, *infra*). On or about December 1, 1976, the Court of Appeals denied a Petition for Rehearing and/or in the Alternative a Petition for Rehearing En Banc, a copy of the said Order of the said Court is attached hereto and made a part hereof and incorporated herein by reference, the same being marked as Appendix B.

Jurisdiction of the instant Court is invoked under Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment to the Constitution of the United States prohibits the surreptitious monitoring by federal agents, acting without a search warrant and without the consent of the individual whose conversation is being monitored, of a personal conversation between an individual and a government informer by means of a kel set worn by the informer which allows the federal agent to record and monitor the conversation while it occurs.

2. Whether the Fourth Amendment to the Constitution of the United States prohibits the surreptitious recording of telephone conversations between an individual and a government informer accomplished by the informer and/or government agent placing an induction coil on the receiver of a telephone and accomplished without a search warrant or the consent of the individual whose conversation is recorded.

3. Whether the affidavit in support of the search warrant issued in the instant cause for the premises at 8734 Clifton in the County of St. Louis, State of Missouri, on April 8, 1976, was sufficient to meet the requirement of probable cause as per the Fourth Amendment to the United States Constitution.

STATEMENT

The Petitioner-Defendant, hereinafter referred to as the Petitioner, was convicted after a jury trial in the United States District Court for the Eastern District of Missouri, Eastern Division, of violating Title 21 U.S.C. Sections 841(a)(1), 843(b) and 846. He was sentenced to an aggregate term of imprisonment of thirty-five (35) years, followed by an aggregate special parole term of eleven (11) years, and was fined in the aggregate amount of Twenty-Four Thousand Dollars (\$24,000.00). Jurisdiction of the instant cause was in the United States District Court for the Eastern District of Missouri, Eastern Division, pursuant to Title 18 U.S.C. Section 3231.

Ronald Cannon began working for the United States Government as an informer on or about February 18, 1976, under the supervision of Randall D. Oitker, a special agent with the Drug Enforcement Administration. (Tr.37,38). On that date, (Tr.38), and on several subsequent dates, namely, February 19, 1976, (Tr.47), March 2, 1976, (Tr.64,65) and April 8, 1976, (Tr.96), Cannon and/or Oitker placed an induction coil on the receiver of a telephone and recorded conversations between Cannon and the Petitioner herein, Sylvester Jones, during which recordings the Petitioner herein made certain incriminating statements.

Cannon was a friend of the Petitioner herein, (Tr.152,153), but Jones did not know and was not told that Cannon was working with the Government. Furthermore, the recordings were made without the knowledge and/or consent of the Petitioner, Jones, (Tr.7,8), and without a search warrant. (Tr.7). The recordings of the telephone conversations and transcripts thereof, as well as the testimony of Randall Oitker, Ronald Cannon and the Petitioner, Sylvester Jones, were introduced at the trial of Jones. (Tr.154,155,37,150,391). Petitioner objected to the introduction of the tapes and the transcripts. (Tr.154,155).

On February 19, 1976 (Tr. 49, 58), March 2, 1976 (Tr. 75, 76, 77), March 5, 1976 (Tr. 83-86), March 9, 1976 (Tr. 90, 91), March 17, 1976 (Tr. 93), and April 8, 1976 (Tr. 98, 99), Ronald Cannon met personally with the Petitioner and the conversations between Ronald Cannon and the Petitioner were transmitted, by means of a kel set Randall Oitker had hidden on the person of Ronald Cannon, to a receiver operated by Randall Oitker and the same were recorded. These conversations, including certain incriminating statements by the Petitioner herein, were in fact included on the recordations. Again, the conversations were transmitted and recorded without the Petitioner's consent and/or knowledge, and without a search warrant (Tr. 7, 8); and the same were engaged in without the Petitioner knowing that Cannon was working for the government; and were, along with the transcripts thereof, introduced by the United States, over the objection of the Petitioner, in the trial of the Petitioner. (Tr. 154, 155).

On April 8, 1976, a search warrant was issued, upon the affidavit of Randall Oitker, authorizing the search of the premises at 8734 Clifton and the premises were in fact searched. (Tr. 101-106). The products of the search were introduced at the trial of the Petitioner over the objection of the Petitioner. (Tr. 102-106, 378, 380). A copy of the affidavit in support of the said search warrant is attached hereto, made a part hereof and incorporated herein and the same is marked as Appendix C.

REASONS FOR GRANTING THE WRIT

I

The Writ of Certiorari should be granted for the reason that the decision of the United States Court of Appeals for the Eighth Circuit is in conflict with the decision of the United States Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967). In that case, the Supreme Court ruled that Federal Agents, acting without a warrant and without the consent or knowledge of any of the parties to the conversations, who placed a listening and recording device on the outside of a public telephone booth and monitored the defendant's telephone conversations, had violated the Fourth Amendment. In so ruling, the Court made three points. First, the Court decided the reasonableness of a search does not depend on the presence or absence of a common law trespass since "the Fourth Amendment protects people, not places." 389 U.S. at 351. In essence, the Court ruled that where a person has a reasonable expectation that what he says will remain private and where he acts in a manner to retain the privacy, the Fourth Amendment protects that privacy. Secondly, the Court reaffirmed its earlier decisions that the Fourth Amendment governs seizure of oral communication as well as tangible items. 389 U.S. at 353. Finally, the Court emphatically states, "Over and over again this Court has emphasized that the Fourth Amendment requires adherence to the Judicial process" and "that searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject to only a few specifically established and well-delineated exceptions." 389 U.S. at 357. A footnote enumerated the exceptions of searches conducted pursuant to a lawful arrest, searches conducted with probable cause in exigent circumstances, and automobile searches, 389 U.S. at 357, N. 19, none of which, the Court concluded, could be used to justify electronic surveillance. 389 U.S. at 357, 358.

In the case at bar, Sylvester Jones was engaged in private conversations quietly carried on between himself and Ronald Cannon. He had every reason to believe his words would remain private. He was an acquaintance of Mr. Cannon's; he did not know Cannon was working with the government; he did not know his conversations were being transmitted and recorded. Therefore, the seizure of his conversations without prior approval by the judicial process was per se unreasonable under the Fourth Amendment.

II

The Writ of Certiorari should be granted to resolve the important question of the constitutionality of the Government recording telephone calls between agents of the Government and an individual when the individual does not know that he is dealing with agents of the Government and does not know that he is under investigation for the violation of federal laws and when the recording is done without a search warrant and without the consent or knowledge of the individual whose conversations are recorded.

In *Lopez v. United States*, 373 U.S. 427 (1963), a federal tax agent, who identified himself as such and who told the defendant Lopez he was investigating the possible tax evasion by the Defendant Lopez, secretly recorded certain conversations between himself and Lopez during the course of which Lopez offered the agent a bribe. The recordings were admitted at the trial to corroborate the testimony of the agent, and the defendant Lopez was convicted. On appeal, Lopez argued that evidence of the conversations should have been suppressed because they were obtained in a manner violative of the Fourth Amendment. 373 U.S. 437. The Supreme Court disagreed and held that the evidence was admissible, stating: "the risk that petitioner took in offering a bribe to Davis [the tax agent] fairly

included the risk that the offer would be accurately reproduced in Court, whether by faultless memory or mechanical recording." 373 U.S. at 439.

In view of the two fact differences between defendant Lopez's situation and the Petitioner's situation herein—defendant Lopez knew he was dealing with an agent of the government and knew he was under investigation, while Jones knew neither—it is not possible to hold that Jones took the risk that his conversation would be reproduced in Court by mechanical means. Since the defendant Lopez knew who he was dealing with and that he was under investigation, it was logical and fair for him to conclude that he assumed the risk that his offer of a bribe would be relayed by the agent to the agent's employer, the United States Government, by whatever means would be convenient. In the present case, however, Petitioner Jones did not know Cannon was an informer for the Federal Government. In fact, he believed Cannon to be a friend. Furthermore, the Petitioner Jones did not know he was under investigation by the Drug Enforcement Administration. Thus, the *Lopez* decision does not answer the question herein presented.

Additionally, the writ should be granted for the reason that the decision in the United States Court of Appeals for the Eighth Circuit is in conflict on the same point also with *Katz v. United States*, supra. The evidence of the recordings of telephone conversations should have been admitted only if Mr. Jones did not have a reasonable expectation that his conversation would remain private or did not act in a manner to keep his conversation private. *Katz v. United States*, 389 U.S. at 351 and 353. The telephone calls in question were made to or by Sylvester Jones from a private phone. First, the Supreme Court recognized in *Katz*, 389 U.S. at 352, that a person using a public telephone is "entitled to assume the words he utters in the mouthpiece will not be broadcast to the world." Certainly, Mr. Jones, using a private phone was entitled to make

that same assumption. Mr. Jones did have a reasonable expectation that his conversation would not be broadcast to the public—and it should be of no consequence that the broadcast occurred after the phone call rather than simultaneously with the phone call.

Secondly, Mr. Jones did not act in a manner indicating he intended to broadcast his phone calls to the public. As noted before, the phone calls were made on private lines and were recorded without his knowledge. Therefore, Sylvester Jones has a reasonable and subjective expectation his conversations would remain private. Because of those expectations, the Fourth Amendment prohibits seizure of the conversations without a warrant and requires the suppression of the conversations so seized. *Katz v. United States*, 389 U.S. at 351 and 353.

III

The Writ of Certiorari should also be granted for the reason that the decision of the United States Court of Appeals for the Eighth Circuit is in conflict with the decision of the United States Supreme Court in *Spinelli v. United States*, 393 U.S. 410 (1969) and *Aguilar v. Texas*, 378 U.S. 108 (1964).

The issue presented was whether the affidavit in support of the search warrant, pursuant to which certain evidence admitted at the trial was seized, was insufficient to furnish probable cause for the Judge to issue the warrant.

In *Aguilar v. Texas*, 378 U.S. 108 at 112, 84 S.Ct. 1509, 12 L.Ed. 723 (1964), the Supreme Court quoted from an earlier opinion, "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from *facts or circumstances* presented to him under oath or affirmation." 378 U.S. at 112.

The question there becomes whether sufficient facts or circum-

stances were alleged to give Judge Wangelin probable cause to believe the premises at 8734 Clifton contained heroin.

The affidavit alleged that a confidential informant had made five (5) separate purchases of heroin from Sylvester Jones since the informant began working for the Drug Enforcement Administration and that the purchases were made under government surveillance. It was further alleged that on each of these occasions, except the first, Sylvester Jones had been observed "traveling to 8734 Clifton, entering the house, and leaving after a short time and traveling directly to where the pre-arranged location for the transfer had been made." The affidavit also related that the utilities at 8734 Clifton were listed in the name of Mary K. Jones and/or Mary K. Joplin. Finally, the affidavit alleged that on the date of the last purchase, Sylvester Jones had visited 8734 Clifton, as explained above and that when Sylvester Jones was arrested at the pre-arranged purchase location, no narcotics were found on his person or in his car.

These facts and circumstances, although they may be sufficient to give rise to probable cause Sylvester Jones was selling heroin, are not sufficient to give rise to probable cause to believe the house at 8734 Clifton contained heroin. First, the fact most strongly negating probable cause is that no heroin was found on Mr. Jones or his car after he had visited 8734 Clifton on the date of his arrest. Rather than showing probable cause, this fact would show the agent's suspicion that the house contained heroin was in error, and that Sylvester Jones was not obtaining heroin when he visited 8734 Clifton.

Secondly, the facts that Mr. Jones apparently did not pick up heroin at 8734 Clifton on the date he was arrested and that he did not go to 8734 Clifton at all on the date of the first alleged purchase means that he traveled to the house before only three of the five alleged purchases. This, too, would seem to negate probable cause to believe the house contained heroin.

Finally, the affidavit does not allege that any criminal activities or circumstances indicating criminal activities were observed at 8734 Clifton. In *Spinelli v. United States*, 393 U.S. 410 at 414, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), the Supreme Court held that the portion of an affidavit alleging the defendant had been observed by agents traveling to and from a certain apartment on several occasions was irrelevant to the determination of probable cause to support a search warrant for that apartment, for the reason that only innocent activity was alleged. Applying that rationale to the instant appeal, no probable cause existed to believe the house at 8734 Clifton contained heroin because the only activities alleged to connect the house with the heroin was that Sylvester Jones was observed visiting the house.

CONCLUSION

The first two (2) issues above presented involve important questions under the Fourth Amendment which have been surrounded by an aura of confusion since the Court's decision in *Katz v. United States*, supra, and the Petitioner Sylvester Jones respectfully requests the Court to resolve those issues. The third issue in regard to the affidavit for the search warrant is in conflict with the Court's definitive decisions in *Aguilar v. Texas*, supra, and *Spinelli v. United States*, supra, and the Petitioner respectfully requests the Court to resolve that issue in accord with those decisions.

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APPENDIX

— A-1 —

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

Nos. 76-1536 and 76-1537

No. 76-1536

United States of America,

v.

Judith Jones,

Appellee,

Appellant.

Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

No. 76-1537

United States of America,

v.

Sylvester Jones,

Appellee,

Appellant.

Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

Submitted: October 11, 1976

Filed: November 9, 1976

Before LAY, ROSS and HENLEY, Circuit Judges.

LAY, Circuit Judge.

Sylvester Jones was convicted under a 14-count indictment for conspiracy to distribute heroin, distribution of heroin, use of a communications facility in furtherance of the distribution

of heroin, and possession of heroin with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 843(b) and 846. Judith Jones, Sylvester's wife, was convicted of one count for conspiracy to distribute heroin, one count for using a communications facility in furtherance of the conspiracy to distribute heroin, and another count for using a telephone to facilitate the distribution of heroin in violation of 21 U.S.C. §§ 843(b) and 846. Sylvester Jones was sentenced to an aggregate term of 35 years imprisonment to be followed by an 11-year special parole term and fined \$24,000. Judith Jones was sentenced to five years imprisonment to be followed by a three-year special parole term.

On appeal Sylvester asserts that the district court erred in refusing to suppress telephone and transmitter recordings and evidence seized under a search warrant. In addition he claims the district court committed prejudicial error in admitting testimony of an alleged accomplice concerning Sylvester's prior criminal conduct. Judith Jones complains that the district court should have severed her trial or alternatively entered a judgment of acquittal because of insufficient evidence. We affirm the judgment of conviction of Sylvester Jones on all counts. We reverse the conviction of Judith Jones and remand to the district court with instructions to enter a judgment of acquittal for lack of sufficient evidence to sustain the conviction.

I. The Facts.

The government's evidence revealed that on February 19, 1976 Sylvester Jones and a woman believed to be Judith Jones were followed from their home to the parking lot of the Fleetwood Auto Body Shop by federal agents. The agents saw Sylvester place a brown paper bag in the trunk of a blue Buick Electra automobile. On that same date Ronald Cannon, serving as a government informant, was searched and fitted with a body transmitter by a federal agent. Cannon then

proceeded to the body shop's parking lot where he met with Sylvester and gave him \$600 of government funds. Sylvester directed him to the trunk of the blue Electra. Sylvester retrieved the brown paper bag and gave it to Cannon, who returned it to a federal agent. The woman thought to be Judith Jones was not present at the transaction, but rather was 30 yards away.

On March 2, 1976 Cannon again was searched, fitted with a body transmitter and given \$250 by a federal agent. Cannon was followed by federal agents to the parking lot of a drug store. There Cannon met Sylvester and gave him the \$250 in exchange for a small package, which Cannon later gave to a federal agent.

On March 5, 1976 Sylvester brought to Cannon's house a spoon of heroin to alleviate a misunderstanding concerning the March 2 transaction. Cannon gave the package to a federal agent and made arrangements with Sylvester to purchase an ounce of heroin. Later that day Cannon met with George Fields and received an ounce of heroin in exchange for \$1,250. Sylvester was seen by federal agents in the general area of the transaction.

On March 17, 1976 in an attempt to purchase two ounces of heroin for \$2,500, Cannon called the Jones' residence and talked with Judith Jones. In that conversation the following exchange took place:

Cannon: Hello, Judy, this is Ronnie.

Judith: Oh, I was just trying to call you. Uh, uh go over to that shop where you were.

Cannon: Shop where I was?

Judith: Uh-huh, you know that shop where you went before.

Cannon then drove to the parking lot of the body shop and met with Sylvester. Sylvester directed Cannon to look at the back rear wheel of a blue Chevrolet automobile where Cannon discovered a package.

On April 8, 1976 Cannon called Sylvester to arrange a purchase of eight ounces of heroin. Due to the large amount, Sylvester arranged a meeting. Cannon wearing a body transmitter met with Sylvester and agreed to the sale. Later that day Cannon called the Jones' residence and talked to Judith. Judith relayed this message, "Fine, *she* said she'd meet you at the pharmacy, and you-all could go to the doctor from there. When Cannon replied that he did not have a car, Judith said she would call *him* and later she called Cannon and said that *he* was already gone.

At the pharmacy, the same place where the transaction was completed on March 2, Sylvester was arrested. A search of his car revealed no narcotics. Since Sylvester was seen visiting a house at 8734 Clifton on all but one occasion just prior to selling narcotics to Cannon, a search warrant for 8734 Clifton was obtained. A search of the premises revealed seven plastic bags of heroin.

At the trial the defendants moved to suppress the telephone and transmitter recordings and the evidence seized pursuant to the search warrant for 8734 Clifton. Judith Jones, named only on three counts of the 14-count indictment, moved for a severance for fear of guilt by association. The motions to suppress and for severance were denied. After the jury's guilty verdict, the defendants moved for an arrest of the judgment or in the alternative a new trial. In support of this motion the defendants urged the reasons for their previous motions and cited the allegedly prejudicial effect of Cannon's testimony concerning Sylvester's prior criminal conduct.

II. Sylvester's Appeal.

Sylvester first contends that the telephone and body transmitter recordings were admitted into evidence in violation of his Fourth Amendment rights. The Supreme Court and this circuit have held that a defendant's Fourth Amendment rights are not violated when the defendant's conversations with a government informant are recorded with the consent of the informant. *See United States v. White*, 401 U.S. 745 (1971) (plurality opinion); *United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976); *United States v. Rich*, 518 F.2d 980 (8th Cir. 1975); *United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975). *See also Hoffa v. United States*, 385 U.S. 293 (1966).

Secondly, Sylvester argues that the affidavit in support of the search warrant of 8734 Clifton was insufficient to furnish probable cause for the warrant's issuance, because it merely alleged that Sylvester Jones was seen visiting the house and that such conduct was only "innocent-seeming activity" which the Supreme Court in *Spinelli v. United States*, 393 U.S. 410, 414 (1969), held to be irrelevant to the determination of probable cause. We disagree.

The affidavit set forth the previous arrangement for Cannon's purchases of heroin from Sylvester and that upon all but one occasion Sylvester went to his house at 8734 Clifton before delivery of the heroin. This information was corroborated by the observations of federal agents and the telephone and body transmitter recordings.

"The affidavit need only establish the *probability* of criminal activity and secreting of evidence on specific premises, not proof beyond a reasonable doubt." *United States v. Smith*, 462 F.2d 456, 460 (8th Cir. 1972) (original emphasis). *See also United States v. Harris*, 403 U.S. 573, 584 (1971); *Spinelli v. United States*, 393 U.S. 410, 419 (1969). We find that the

affidavit set forth sufficient reliable underlying facts for the issuing court to find that there was probable cause to believe that heroin was present in the house at 8734 Clifton.

Lastly Sylvester argues that Cannon's testimony concerning a previous heroin transaction with Sylvester, which was outside the scope of the indictment, was prejudicial.

On cross-examination Sylvester's counsel had attempted to portray Cannon as needing to "finger" somebody for his own self-preservation¹ and that he picked Sylvester Jones. On redirect the government attempted to show that it knew that Sylvester was Cannon's heroin source prior to Cannon's arrest. It was during this questioning that the previous heroin transaction was related. Viewing the testimony from this posture together with the convincing evidence of Sylvester's guilt, we conclude that the testimony did not unduly prejudice Sylvester's defense.

III. Judith's Appeal.

Judith Jones was convicted of one count of conspiracy to distribute heroin, one count of using a telephone to facilitate the distribution of heroin and one count of using a telephone to facilitate a conspiracy to distribute heroin. She challenges on appeal the district court's refusal to sever her trial from Sylvester's and to dismiss for lack of sufficient evidence.

To convict a person for conspiracy to commit a crime it is not necessary to prove that the defendant knew all of the conspirators or was aware of all the details, but it must be shown that the person "knowingly contributed . . . efforts in furtherance of it." *United States v. Hester*, 465 F.2d 1125, 1127 (8th

¹ Cannon was awaiting sentence after pleading guilty to possession of heroin with intent to distribute. In addition Cannon was admittedly cooperating with the government in return for the dismissal of a charge for conspiracy to distribute heroin.

Cir. 1972) (quoting *Nassif v. United States*, 370 F.2d 147, 152 (8th Cir. 1966)). Knowledge is also essential for a conviction under 21 U.S.C. § 843(b).

The evidence shows that Judith *may* have on one occasion accompanied Sylvester to a meeting with Cannon.² This was the February 19, 1976 meeting. At this meeting the woman involved did not participate in the transaction, but was 30 yards away in the parking lot.

Other than the fact that Sylvester and Judith are married, the only other evidence allegedly linking Judith to the conspiracy are her two telephone conversations with Cannon. On March 17, 1976 in a telephone conversation, Judith directed Cannon to the body shop "where you went before." The conversation did not demonstrate that Judith had knowledge of the transaction which had previously transpired at the body shop or of one which might take place. Judith testified that she often relayed messages for her husband and that she did not participate in any drug sales.

In a telephone conversation on April 8, 1976 Judith told Cannon that an individual referred to as "she" would meet him at the pharmacy, and then the two of them would go to the "doctor." When Cannon said he did not have a car, Judith said she would call "him." Judith later called Cannon and told him that "he" was already gone. The government argues that the first statement was in code and that the subsequent calls demonstrate that Judith knew the code and that known use of a code demonstrates knowledge of the conspiracy. An equally strong inference from this evidence is that Judith was merely relating a message for her husband, which she testified she did not always understand.

² Two government witnesses testified that they thought the woman at the February 19 meeting was Judith Jones, but Sylvester and Judith testified that it was not Judith, but a woman who greatly resembled her.

Evidence must do more than merely raise suspicion or possibility of guilt. Surmise cannot be permitted in a criminal case. We are not persuaded that the evidence was sufficient to convince a fair minded jury beyond a reasonable doubt that Judith "knowingly" participated in the alleged conspiracy or that she "knowingly" used a communications facility in furtherance of a conspiracy to distribute heroin or in furtherance of a distribution of heroin. We order vacation of her convictions. See *United States v. Kelton*, 446 F.2d 669 (8th Cir. 1971). See also *United States v. Shahane*, 517 F.2d 1173, 1177 (8th Cir.), cert. denied, 423 U.S. 893 (1975); *United States v. Steinhilber*, 484 F.2d 386, 389 (8th Cir. 1973); *United States v. Jensen*, 462 F.2d 763 (8th Cir. 1972).

The judgment of conviction of Sylvester Jones in case No. 76-1537 is affirmed; the judgment of conviction of Judith Jones in case No. 76-1536 is ordered reversed and the cause is remanded with direction to enter a judgment of acquittal.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States Court of Appeals for the Eighth Circuit

76-1537

September Term, 1976

United States of America,

Appellee,

vs.

Sylvester Jones,

Appellant.

} Appeal from the United
States District Court for
the Eastern District
of Missouri

The Court having considered petitions for rehearing en banc filed by appellant and counsel for appellant and, being fully advised in the premises, it is ordered that the petitions for rehearing en banc be, and they are hereby, denied without prejudice to the appellant to raise any new points set forth in his petition for rehearing before the district court in appropriate proceedings.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

December 1, 1976

APPENDIX C

United States District Court
for the
Eastern District of Missouri

Magistrate's Docket No.

Case No.

United States of America

vs.

Dwelling Numbered 8734 Clifton,
Jennings, Missouri.

Affidavit for
Search Warrant

Before William S. Bahn
Name of Magistrate

St. Louis, Missouri
Address of Magistrate

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) dwelling numbered 8734 Clifton, in the City of Jennings, Missouri, being more particularly described as a single-level all red-brick dwelling with white brick around the front door, a one-car garage with a white door on the left as you face the house, a picture window to the left of the door as you face the house, with chimney and asbestos shingle roof in the Eastern District of Missouri there is now being concealed certain property, namely a quantity of heroin, a Schedule I narcotic drug controlled substance which xx constitutes evidence of a criminal offense, namely, the possession with intent to distribute of heroin, in violation of 21 U.S.C. 841(a)(1).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

This search warrant is requested for the above described residence and is based on the following probable cause. The investigation leading to this request began as follows.

Continued on Attached Sheet

RANDALL OITKER

Special Agent, Drug Enforcement
Administration

Sworn to before me, and subscribed in my presence April 8,
1976.

(Illegible)

(Illegible footnote)

Continuation—Affidavit for Search Warrant

Dwelling Numbered 8734 Clifton, Jennings, Missouri

Approximately the first week of February, 1976, affiant was contacted by a confidential informant, who then began working for the Drug Enforcement Administration. This informant was debriefed and stated that his source of supply was one Sylvester Jones.

From that time to the instant date, this informant has worked with the Drug Enforcement Administrations making purchases of heroin from Sylvester Jones. The information given by this informant has been consistently reliable, straight forward, and trustworthy. Since he began working for the Drug Enforcement Administration, this confidential informant has made five separate buys of heroin from Sylvester Jones. All of the buys were set up through telephone conversations which were recorded. During the course of all negotiations in person and on pur-

chases, the confidential informant wore a body transmitter, and the conversations were thereby recorded.

On each occasion the substance purchased was sent to the Drug Enforcement Administration laboratory in Chicago, where it was analyzed to contain heroin.

Further investigation by surveillance officers has revealed that on all the pre-arranged purchases, except for the first purchase, the defendant Sylvester Jones has been observed as traveling to 8734 Clifton, entering the house, and leaving after a short period of time and going directly to where the pre-arranged location for the transfer had been made.

The utilities at 8734 Clifton, Jennings, Missouri, are listed in the name of Mary K. Jones and/or Mary K. Joplin.

On this date, the confidential informant previously referred to called the defendant Sylvester Jones to purchase eight ounces of heroin. Jones responded that he would have to meet with the informant and talk about this. The informant met with Jones under the surveillance of Drug Enforcement Administration Officers. During that conversation, which was recorded on a body transmitter, Jones agreed to sell the eight ounces of heroin, but stated that he would have to use certain precautions due to the large amount of the sale. He suggested that half of the narcotics be delivered at one time, paid for, and then the second half would be delivered. Jones stated it would take him a little while to get it together, and told the informant to get his money together and to call him when he had it. The informant stated it would take 45 minutes to get the money together.

Jones then drove directly to the 8734 Clifton address and was subsequently seen driving to his home address at 12680 Tallow Hill, Creve Coeur, Missouri.

(Illegible footnote)

No. 2—Continuation—Affidavit for Search Warrant

Dwelling Numbered 8734 Clifton, Jennings, Missouri

The confidential informant called Jones approximately an hour later and informed Jones that he had his money together, and Jones said, "I'll call you back."

In a subsequent phone call, Jones stated that he was sending the stuff over. Jones then left his home and drove to 8734 Clifton. Shortly thereafter, Jones's wife, Judy, called the informant and told the informant that Sylvester wanted the informant to meet him at the pharmacy, a location previously used for purchases. It should be noted that this pharmacy is located at Natural Bridge and Jennings Station Road in Pine Lawn, Missouri, a reasonably short distance from the Clifton address. Jones was then seen leaving 8734 Clifton and was arrested at the meeting spot. A search of his person and automobile turned up no narcotics.

It is therefore requested that a search warrant be issued authorizing agents of the Drug Enforcement Administration to search the residence known as 8734 Clifton, Jennings, Missouri, as on four previous occasions Jones followed the same procedures as on this date, Jones has stated that the purchase could be arranged this date, and stated that extra precautions would have to be taken this date.

(Illegible footnote)
